KHOR CHENG WAH

v.

SUNGAI WAY LEASING SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN J
[CIVIL APPEAL NO: P-02-70-94]
17 JANUARY 1996

CIVIL PROCEDURE: *Default judgment - Setting aside - Whether judgment irregular - Delay in application - Delay attributed to negligence of solicitor - Whether explanation satisfactory - Whether unreasonable.*

The respondent is a leasing company engaged in the business of leasing movables, while the appellant is one of the guarantors to a leasing agreement the respondent had entered with Creative Art Sdn. Bhd. (CASB) in 1983. CASB defaulted in its obligations, and in October 1985 the respondent issued a writ against the guarantors claiming the sum of RM 82,954.68 and interest thereon. The guarantors entered appearance, but did not deliver any defence, even after notice to enter judgment in default of defence was given by the respondent on 17 October 1986. Judgment in default of defence, as it was, was entered on 9 March 1988. On 5 April 1994, i.e. about six years after the *ex parte* judgment was entered, the appellant took out a summons and applied to strike out the judgment. The application was dismissed by the learned Judge on ground of unreasonable delay, whereupon the appellant appealed. Before the learned appeal Judges, the appellant sought to explain the delay by stating that he had placed the conduct of his defence to a solicitor who, somehow, failed to protect his interest.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] It is a cardinal principle of law, that when a litigant seeks the intervention of the Court in a matter that affects his rights, he must do so timeously.

[2] In all cases in which delay in approaching the Court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it.

[3] This Court will not, whenever feasible, allow a client to suffer the negligence of his solicitor. But there are limits to what may be done in the interest of justice.

[4] The explanation offered by the appellant that he had placed the conduct of his defence in the hands of his solicitor who did little to protect his interest is not reasonable. The facts showed that the appellant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. It would be injustice to visit the consequences of the appellant's indifference upon the plaintiff's head.

[5] The respondent had granted the appellant every indulgence in the matter of the delivery of pleadings. The chronology reveals that after warning the appellant on 17 October 1986, the respondent waited for about eighteen months before entering default judgment. It is a harsh result indeed if they are to be punished for this.

[6] After the coming into force of the Rules of the High Court 1980, the distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of Court result in their being curable and not nullities. In the present case, even assuming that the judgment was entered for too much because the interest rate there stipulated was greater than that permitted by law, it is still a matter that may be cured by amendment without any resultant prejudice to anyone. The facts showed that the plaintiff had applied for just that.

[7] I am in agreement with the Judge that the judgment is not irregular in any way. In arriving at that conclusion the learned Judge relied on the judgment of Edgar Joseph Jr. SCJ in *Public Finance Bhd v. Lee Bee Rubber Factory Sdn. Bhd*. He was right in doing so. It is an authority binding upon him as it is upon this Court.

[Appeal dismissed]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Penghakiman ingkar - Pengenepian - Samada penghakiman di luar aturan - Kelewatan dalam permohonan - Kelewatan disandarkan kepada kecuaian peguamcara - Samada penjelasan memuaskan - Samada tidak wajar.*

Responden adalah sebuah syarikat pajakan yang mengendalikan perniagaan memajakkan peralatan boleh alih, sedangkan perayu pula adalah salah seorang penggerenti kepada suatu perjanjian pajakan yang dimasuki oleh responden dengan Creative Art Sdn. Bhd. (CASB) dalam tahun 1983. CASB telah memungkiri kewajipannya, dan dalam bulan Oktober 1985, responden telah mengeluarkan satu writ terhadap penggerenti-penggerenti menuntut jumlah

sebanyak RM82,954.68 dan faedah ke atasnya. Penggerenti-penggerenti telah memasukkan kehadiran tetapi tidak mengemukakan apa-apa pembelaan, walaupun selepas notis untuk memasukkan penghakiman ingkar pembelaan telah diberikan oleh responden pada 17 Oktober 1986. Penghakiman mungkir pembelaan, sepertimana keadaannya, telah dimasukkan pada 9 Mac 1988. Pada 5 April 1994, iaitu lebihkurang enam tahun selepas penghakiman *ex parte* dimasukkan, perayu telah mengeluarkan saman dan memohon untuk membatalkan penghakiman tersebut. Permohonan ini telah ditolak oleh Hakim yang bijaksana atas alasan kelewatan yang tidak wajar, selepas mana perayu telah merayu. Di hadapan Hakim rayuan yang bijaksana, perayu cuba untuk menerangkan kelewatannya dengan menyatakan bahawa beliau telah menyerahkan pembelaannya itu kepada seorang peguamcara, yang entah bagaimana gagal untuk melindungi kepentingannya.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Ianya adalah prinsip undang-undang yang penting, bahawa apabila litigan memohon pencelahan Mahkamah dalam sesuatu perkara yang menjejaskan haknya, ianya mestilah melakukannya tepat pada masanya.

[2] Dalam kesemua kes dalam mana kelewatan dalam mendekati Mahkamah menjadi isu, bebanan adalah terletak pada litigan yang telah lewat untuk memberi penjelasan yang memuaskan.

[3] Mahkamah ini tidak akan, di mana boleh, membiarkan sesorang anak guaman mengalami kecuaian peguamcaranya. Tetapi terdapat hadnya kepada apa yang boleh dilakukan demi kepentingan keadilan.

[4] Penjelasan yang ditawarkan oleh perayu bahawa beliau telah menyerahkan pembelaannya dalam tangan seorang peguamcara yang tidak melakukan apa-apa untuk melindungi kepentingannya adalah tidak wajar. Fakta-fakta telah menunjukkan bahawa perayu tidak melakukan apa-apa untuk menghubungi peguamcaranya pada bila-bila masa yang lebih awal untuk mengetahui kedudukan litigasi terhadapnya. Ianya adalah tidak adil untuk meletakkan akibat sifat tidak ambil peduli perayu atas bahu plaintif.

[5] Responden telah memberikan perayu lanjutan masa dalam perkara pengemukakan pliding. Kronologi mendedahkan bahawa selepas memberi amaran kepada perayu pada 17 Oktober 1986, responden telah menunggu selama 18 bulan sebelum memasukkan penghakiman ingkar. Ianya adalah satu keputusan yang sesungguhnya tidak adil sekiranya mereka dihukum bagi perkara ini.

[6] Selepas berkuatkuasanya Kaedah-kaedah Mahkamah Tinggi 1980, perbezaan antara luar aturan dan pembatalan tidak lagi wujud. Kesemua perbuatan dan peninggalan yang membawa kepada ketidak-patuhan dengan satu atau lebih daripada kaedah-kaedah Mahkamah menjadikannya boleh dipulihkan dan bukannya pembatalan. Dalam kes semasa ini, jikapun penghakiman yang telah diberi itu dianggap terlalu banyak kerana kadar faedah yang ditentukan di situ lebih tinggi dari yang dibenarkan oleh undang-undang, ianya masih merupakan perkara yang boleh dipulihkan melalui pindaan tanpa apa-apa akibat yang menjejaskan sesiapa. Fakta menunjukkan bahawa plaintif telah memohon untuk perkara ini.

[7] Saya bersetuju dengan Hakim bahawa penghakiman tersebut tidak di luar aturan dalam apa cara pun. Dalam mencapai keputusan itu Hakim yang bijaksana telah bergantung pada penghakiman Edgar Joseph Jr. SCJ dalam *Public Finance Bhd. v. Lee Bee Rubber Factory Sdn. Bhd.* Beliau betul dalam melakukan sedemikian. Ianya merupakan satu autoriti yang mengikatnya sepertimana ianya mengikat Mahkamah ini.

[Rayuan ditolak]

Cases referred to:
Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241 ***(foll)***
Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman [1995] 4 CLJ 127 ***(refd)***
Isaacs v. Robertson [1985] AC 97 ***(refd)***
Metroinvest Ansalt v. Commercial Union Assurance Co. Ltd. [1985] 1 WLR 513 ***(foll)***
Public Finance Bhd. v. Lee Bee Rubber Factory Sdn. Bhd. & 2 Ors. [1994] 2 CLJ 646 ***(foll)***

Legislation referred to:
Rules of the High Court 1980

For the appellant - Louis Van Buerle; M/s. Cheong Wai Meng & Van Buerle
For the respondent - Gerard Chan; M/s. Lim Kean Siew & Co.

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal against the decision of Azmel J, delivered in the High Court at Penang, refusing an application by the appellant (the fourth defendant in the Court below) to set aside a default judgment entered against him. For convenience, I shall refer to the parties according to the title assigned to them in the Court below.

This appeal was heard and dismissed on 20 November 1995. The reasons now follow.

Facts and Chronology

The plaintiff (the respondent before this Court), as its name suggests, carries on the business of leasing movables. On 28 September 1983, it agreed to lease certain equipment to the first defendant (a limited company). The agreement was in writing. The other defendants guaranteed the due performance of the terms of the leasing agreement.

The first defendant did not meet its obligations under the leasing agreement. So, the plaintiff took out a writ on 2 October 1985, claiming the sums due to it and other ancillary relief. Its statement of claim contained the following endorsement:

> 12. Wherefore the plaintiff claims against the defendants for:
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> (a) the said sum of RM82,954.68;
>
> (b) interest thereon at the rate of 2% per month on a daily basis from the 1 October 1985 until realisation;
>
> (c) other monies, sums, costs and expenses incurred by the plaintiff;
>
> (d) costs; and
>
> (e) such further and/or other relief as this honourable Court may deem fit and proper.

The writ was served on M/s. Goh Bean Sim & Partners, Advocates & Solicitors, who had been nominated by the defendants to represent them in the suit. An appearance was entered to the writ. However no defence was delivered within the time limited by the rules.

On 17 October 1986, that is to say, almost one year after the issue of the writ, the plaintiff's solicitors wrote to the defendants' solicitors giving them notice that unless the defence was delivered within 48 hours therefrom, judgment in default of defence would be entered. Nothing further appears to have transpired until 30 April 1987, when the plaintiff's solicitors filed a certificate stating that the defendants had defaulted in delivering their defence. Then, on 9 March 1988, the plaintiff entered judgment in default of defence. This judgment gave to the plaintiff the relief it had claimed in prayers (a), (b), (c) and (d) of para. 12 of its statement of claim.

The next event took place on 10 March 1994. On that day, the plaintiff took out a summons to amend the default judgment entered on 9 March 1988. The amendment had the effect of deleting the award of interest as claimed in prayer (b) of the statement of claim, and substituting therefor interest at the rate of 8% per annum from the date of judgment until the date of realisation.

The plaintiff served this summons on the fourth defendant. This obviously had the effect of waking him from the deep slumber into which he had fallen for the best part of the preceding six years. He made a search of the Court docket and found that judgment in default of defence had been entered against him. He then instructed his present solicitors who took out a summons on 5 April 1994, to set aside the judgment.

The fourth defendant's summons came up for disposal before Azmel J on 11 May 1994. Although the fourth defendant raised several matters in the affidavits he delivered, arguments before the learned Judge were confined to only two issues. The first of these was the interest point. The second was the delay in making the application to discharge the *ex parte* judgment. The notes recorded by the learned Judge bear this out.

The learned Judge, after hearing submissions, reserved his decision until 12 July 1994, when he, in the exercise of his discretion, dismissed the fourth defendant's summons.

The Appeal

When he opened his arguments on the appeal, Encik Van Buerle attempted to argue matters which had been obviously abandoned before the learned Judge. He was not permitted to adopt this course. It would have been plainly unfair to the learned Judge and to the plaintiff for this Court to consider the appeal on the basis of a point upon which the fourth defendant had, by his conduct, precluded the Judge from expressing his view. Moreover, this is a matter which essentially involved the exercise of discretion and it is therefore desirable, if not essential, to have the views of the tribunal in whom the law vests that primary discretion.

Counsel for the fourth defendant was therefore left with the two issues that were argued before the learned Judge. I shall consider them in the order in which they were presented during argument.

The Delay Point

It is a cardinal principle of law, that when a litigant seeks the intervention of the Court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a Court may refuse relief to an indolent litigant.

In all cases in which delay in approaching the Court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends

upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the Judge in whom the law primarily vests the discretion.

The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 at p. 247; [1996] 1 AMR 215. It is a decision of the Federal Court and therefore quite plainly binds this Court. There, Edgar Joseph Jr. FCJ, said (at p. 225):

> The general rule is that when it is clearly demonstrated to the satisfaction of the Court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justiciae*, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made:
>
> (a) with reasonable promptitude, in other words within a reasonable time and
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> (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2 r. 2(i) of the Rules of the High Court 1980.)

In the present case, the explanation of the fourth defendant for the delay in making his explanation is, to summarise his affidavits, that he placed the conduct of his defence in the hands of a solicitor who did little to protect his client's interests.

Is that a reasonable explanation? The learned Judge did not think it was. And I agree with him. Undoubtedly, this Court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see, *Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 at p. 152; [1995] 1 MLJ 457, at p. 490, per V.C. George JCA.

But there are limits to what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head.

There is another factor in this case which turns the scales against the defendant. In fairness to the plaintiff and its solicitors, it must be said of them that they granted to the fourth defendant's solicitors every indulgence in the matter of the delivery of pleadings. The chronology to which I earlier alluded reveals that after warning the defendants' solicitors, they waited for about 18 months before entering default judgment. It is a harsh result indeed if they are to be punished for this.

Once the question of delay is resolved against the fourth defendant, there was little left to be argued upon the question of merits. Nevertheless, I shall examine the second issue raised by the fourth defendant.

Excessive Interest

Neither the note taken down by the learned Judge nor his judgment disclose that the fourth defendant had argued that the judgment in this case was irregular and ought to be set aside. However, in fairness to Counsel who argued the case in the Court below (not Encik Van Buerle), there is a reference, both in the judgment and in the note, to an argument that the rate of interest was excessive and that the judgment was not amenable to amendment.

Previously, Courts, in respect of their process and orders, maintained a distinction between irregularities and nullities. The former were curable, but the latter were not. This distinction did not lend much clarity to the law. Neither did it, in the preponderance of cases, advance the course of justice.

After the coming into force of the Rules of the High Court 1980, the distinction between irregularities and nullities ceased to exist. All acts and omissions that amount to non-compliance with one or more of the rules of Court result in their being curable irregularities and not nullities. Indeed it is quite inappropriate to say of an order or decision of a Court of unlimited jurisdiction (such as the High Court and other superior Courts) that it is a nullity.

The point, I believe, has been so well put by Lord Diplock in *Isaacs v. Robertson* [1985] AC 97, 102 (PC), that I can scarcely do better than to quote his words:

> Their Lordships would, however, take this opportunity to point out that in relation to orders of a Court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. *Dicta* that refer to the possibility of there being such a distinction between orders to which the descriptions 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals *Marsh v. Marsh* [1945] AC 271, 284 and *MacFoy v. United Africa Co. Ltd.* [1962] AC 152, 160; but in neither of those appeals nor in any other case to which Counsel has been able to refer their Lordships has any order of a Court of unlimited jurisdiction been held to fall into a category of Court orders that can simply be ignored because they are void *ipso facto* without there being any need for proceedings to have them set aside. The cases that are referred to in these *dicta* do not support the proposition that there is any category of orders of a Court of unlimited jurisdiction of this kind; what they do support is the

quite different proposition that there is a category of orders of such a Court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the Court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the Judge a discretion as to the order he will make. The Judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

The contrasting legal concepts of voidnesss and voidability form part of the English law of contract. They are inapplicable to orders made by a Court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the Court that made it upon application to that Court; if it is regular it can only be set aside by an appellate Court upon appeal if there is one to which an appeal lies.

In *Cheow Chew Khoon (supra)*, at pp. 481-2, I expressed the view that a judgment that was entered for too much was not a nullity but a mere irregularity, and that it was amenable to amendment in the circumstances there adumberated. In coming to that conclusion upon the law, I accepted the approach adopted by Cumming-Bruce LJ in *Metroinvest Ansalt v. Commercial Union Assurance Co. Ltd.* [1985] 1 WLR 513. Having read the authorities, including the more recent ones, once again, the view I there expressed is one to which I propose to adhere.

For the purpose of this appeal, I shall assume, without deciding, in the fourth defendant's favour, that the default judgment was entered for too much because the interest rate there stipulated was greater than that permitted by law. It is still a matter that may be cured by amendment without any resultant prejudice to anyone. The plaintiff had applied to just that. It was that application which alerted the fourth defendant, and he moved to set aside the whole of the judgment.

But I must say that I am in agreement with the Judge that the judgment is not irregular in any way. In arriving at that conclusion he relied on the judgment of Edgar Joseph Jr. SCJ delivered in the Supreme Court in *Public Finance Bhd v. Lee Bee Rubber Factory Sdn. Bhd & 2 Ors.* [1994] 2 CLJ 646 [1994] 1 MLJ 495. I think that he was right in doing so. It is an authority binding upon him as it is upon this Court.

Conclusion

Having come to the conclusion that this appeal was devoid of any merit, it was dismissed without the necessity of calling upon Counsel for the plaintiff.

The order of the learned Judge was affirmed. The costs of the appeal were awarded to the plaintiff and the deposit in Court was ordered to be paid out to the plaintiff to account of its taxed costs.

Reported by W.A. Sharif